Meeting of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction

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Practical challenges facing the implementation of Article VII, and possible solutions

A contribution to the discussions on the practical challenges facing the implementation of Article VII, and possible solutions

Submitted by Canada

I. Introduction

1. This paper aims to contribute to the discussion, within the Meeting of Experts "MX4", on the agenda item of "Practical challenges facing the implementation of Article VII, and possible solutions." It expands on some of the challenges highlighted in an earlier working paper submitted by Canada, the United Kingdom of Great Britain and Northern Ireland and the United States of America.[1] It focuses in particular on challenges that the deliberate nature of an outbreak, and the (possible) related invocation of Article VII of the Biological Weapons Convention (BWC) by the State(s) subject to an attack with biological

[1] BWC/MSP/2017/WP.20, dated 5 December 2017: Responding to deliberate biological release: the requirements for effective, coordinated international action. The following Working Papers on Article VII issues have also been submitted by the United Kingdom of Great Britain and Northern Ireland, and the United States of America: BWC/MSP/2018/MX.4/WP.2, dated 26 July 2018; BWC/MSP/2018/MX.4/WP.5, dated 27 July 2018; BWC/CONF.VIII/WP.38, dated 14 November 2016; BWC/CONF.VIII/WP.39, dated 14 November 2016; BWC/CONF.VIII/PC/WP.14, dated 19 July 2016; BWC/MSP/2015/MX/WP.1, dated 6 July 2015; BWC/MSP/2015/MX/WP.2, dated 6 July 2015; BWC/MSP/2014/WP.1, dated 21 November 2014; BWC/MSP/2014/WP.1/Corr.1, dated 24 November, 2014; BWC/MSP/2014/MX/WP.3, dated 24 July 2014; BWC/MSP/2014/MX/WP.1, dated 2 July 2014; BWC/MSP/2014/MX/WP.5, dated 25 July 2014; BWC/MSP/2013/WP.2, dated 3 December 2013.

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agents, could pose for the international response, including as regards the possible involvement of the United Nations (UN) and relevant international organizations.

II. General challenges deriving from the lack of operationalization of Article VII of the Biological Weapons Convention

Invoking Article VII: Decision-making

2. It has been stressed that the decision by a BWC State Party to invoke Article VII might be affected by the many uncertainties and the high political implications that activation of this provision could imply.[2] Invoking Article VII might raise politically sensitive issues, as it would imply a major violation of the Convention and the involvement of the UN Security Council, which could consider the situation under Chapter VII of the United Nations Charter.[3] It has been further argued that invoking Article VII in the absence of clear procedures may create political and legal uncertainties and may complicate the assistance process.[4]

3. As much as there might be drawbacks in triggering Article VII, there are also clear benefits. A determination under Article VII could act as an empowering element, focusing attention and resources on the response as it would give a clear signal of the seriousness and implications of the situation. This was the effect of the establishment of the UN Mission for Ebola Response (UNMEER) in September 2014, which "played a catalytic role in mobilizing the necessary financial and human resources to scale up the response."[5]

4. Article VII could also be invoked to encourage cooperation by States Parties: for example to ensure that specific types or items of assistance going beyond typical humanitarian assistance (such as forensic or logistical assets often in the domain of the military) be provided, or to overcome operational hurdles.

Submitting an Article VII request

5. A request pursuant to Article VII needs to be brought to the attention of both the other BWC States Parties whose assistance is sought, and the UN Security Council for the purpose of deciding whether the requesting State Party has been exposed to danger. However, no guidelines, templates or procedures exist for the submission of such a request. Some attention has been focused on this issue by BWC States Parties in recent years. At BWC meetings in 2014, 2015 and 2016, South Africa submitted working papers containing, *inter alia,* a proposal for a set of guidelines on information that could accompany a request for assistance pursuant to Article VII.[6] As regards the indication of the

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[2] This emerged from a table-top exercise organized in 2016 by UNIDIR and the FRS principally aimed at reflecting on the decision-making processes that could lead to a State Party invoking Article VII. The report on the exercise is available at https://www.frstrategie.org/web/documents/publications/autres/ 2017/2017-nexon-btwc-report.pdf.

[3] *Id., inter alia* p. 9.

[4] *Id.*

[5] See, "Lessons learned exercise on the coordination activities of the United Nations Mission for Ebola Emergency Response", A/70/737, dated 4 March 2016, p. 15, para. 16.

[6] Most recently and in preparation of the 2018 Meeting of Experts on Assistance, Response and Preparedness, South Africa submitted a further refined proposal on the implementation of Article VII,

assistance required, Canada has previously asserted that "in terms of specifying what assistance might be needed, the South African template, first proposed and then up-dated in the BTWC intersessional meetings and at the Eighth Review Conference, should be adopted."[7] Pending the adoption of an agreed procedure, however, choosing how to bring a request to the attention of other States Parties and the UN Security Council is the prerogative of the requesting State Party.

Delivering assistance pursuant to Article VII

6. Response to a disease outbreak, either natural or deliberate, is first and foremost a national endeavour, with States bearing the primary responsibility. In situations where the requirements for a response exceed, in various areas and degrees, one or more States' capability, other States and international organizations with a relevant mandate, as well as other responder actors with relevant expertise and capabilities, might support national response efforts upon request from the concerned State.

7. The Eighth Review Conference also recognized that "States Parties bear the responsibility for providing assistance."[8] The Convention, however, provides no mechanisms for coordinating this assistance, comparable to the mechanisms established pursuant to Article X of the Chemical Weapons Convention (CWC). States Parties' offers of assistance could also be coordinated through other mechanisms, such as the World Health Organization (WHO).

8. In their negotiated common understandings on the interpretation of Article VII, moreover, BWC States Parties stated that they would look to the UN and other relevant international organizations for support in coordinating and delivering assistance. At the Eighth Review Conference, States Parties specified that the UN could play "a coordinating role in providing and delivering assistance under the Convention, with the help of States Parties, as well as the appropriate international organizations."[9] States Parties referred specifically to the WHO, the World Organisation for Animal Health (OIE), the Food and Agriculture Organization of the UN (FAO), and the International Plant Protection Convention (IPPC Secretariat),[10] and noted that "the capacities and experiences of UN and relevant international organizations should be identified and used, within their mandates, when required and upon request of the concerned State Party."[11] At the same time, little attention has ever been paid to what this "important coordinating role" by the UN could entail, and which parts of the Organization would be involved.

9. It has also been stressed before, including by Canada, that major gaps currently exist at the international level regarding coordinated response capabilities to a potential deliberate use of biological agents. There is neither a lead organization nor comprehensive international mechanisms that would ensure the overall coordination of various actors with a relevant mandate and their activities. The current lack of mechanisms or procedures to activate assistance under Article VII exacerbates these complexities. Effective international

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see BWC/MSP/2018/MX.4/WP.3, dated 26 July 2018. Additionally, South Africa submitted a Working Paper on the 'Provision of assistance to a State Party that has been exposed as a result of a violation of the Convention', see BWC/MSP/2018/MX.4/WP.4, dated 26 July 2018.

7 See BWC/MSP/2017/WP.20, dated 5 December 2017, p. 3. See also BWC/CONF.VIII/WP 34, Implementation of Article VII, Submitted by South Africa, 10 November 2017, para. 11.

8 BWC/CONF.VIII/4, Final Declaration, G. Article VII, para. 36.

9 BWC/CONF.VIII/4, Final Declaration, G. Article VII, para. 37.

10 *Id.*

11 *Id.*, para. 39.

and inter-agency cooperation, even beyond "usual" partners, possibly in an Article VII context, is therefore essential. These specific issues are currently being considered within a project conducted by the United Nations Office for Disarmament Affairs (UNODA) aimed at 'Strengthening global mechanisms and capabilities for responding to deliberate use of disease'[12] funded by Canada through its Weapons Threat Reduction Program.[13]

III. General challenges for an international response deriving from the deliberate nature of an outbreak and from a request of assistance pursuant to Article VII

Determining whether an event is deliberate

10. The complexities of determining whether an outbreak is deliberate or natural, and at which point in the phases of an outbreak a deliberate event would be recognized as such, represent crucial junctures in a deliberate use context. In this connection, the capacity to understand, at the earliest, if an outbreak could be the result of deliberate actions needs to be further developed. Sensitizing States towards reporting suspicious or potentially suspicious events is also important.

11. At the same time, a deliberate event could be either covert or overt, with the perpetrator(s) claiming responsibility, while an authoritative determination could come from the Security Council should a request be raised under Article VII of the BWC. However, the timeline in which this determination could be made is undefined, while the mere fact that a serious allegation of use is made when raising an Article VII request would imply that response operators would begin considering the event as – at least – potentially deliberate and adjust their operating modalities accordingly.

Change of context

12. In general terms, response and technical activities of responder actors would essentially remain the same in the case of deliberate use. The mechanisms for detecting and responding to outbreaks of disease in humans, animals and plants are essentially the same, whether the origin of the outbreak is a natural event, accidental or a deliberate release. However, the level of exposure and international attention to the situation would change

[12] In coordination with the UN Office of Counter-Terrorism (UNOCT), this work also builds upon relevant work within the UNOCT "Project on Ensuring Effective Inter-Agency Interoperability and Coordinated Communication in Case of Chemical and/or Biological Attacks". For project outcome documents, see *"Ensuring Effective Inter-Agency Interoperability and Coordinated Communication in Case of Chemical and/or Biological Attacks"*, UN, New York, 2017 (at https://www.un.org/counterterrorism/ctitf/sites/ www.un.org.counterterrorism.ctitf/files/UNCCT_CTITF_WMD_WG_Project_Publication _FINAL.PDF).

[13] Canada's Weapons Threat Reduction Program (WTRP) supports international efforts to reduce the threat of CBRN proliferation and terrorism. The Program was established in 2002 (initially as the Global Partnership Program) to fulfil Canada's commitments to the G7-led *Global Partnership (GP) Against the Spread of Weapons and Materials of Mass Destruction*. Since 2002, the Program has supported more than $1.3B in programming. As 2018 chair of the now 31 country Global Partnership, Canada has prioritised strengthening global mechanisms for responding to and investigating the deliberate use of disease as a weapon.

considerably.[14] Particularly, an Article VII request would increase such complexity. The involvement of the Security Council, possibly under Chapter VII of the UN Charter, and possible accusations from one State against another, would imply a highly politically charged context.

13. A deliberate event, and possible allegations of an attack against a State might also present responder actors with an uncooperative approach by the concerned State(s), particularly where, in a biological attack scenario, one or more bordering States might not be willing to cooperate with each other, for example when one of them is under suspicion of having carried out the attack.

14. At the same time, with the involvement of the security sector, different actors would be involved. In a major deliberate event threatening national security, and particularly in an Article VII context, the national law enforcement authorities as well as the defence authorities of the concerned State would probably take the lead and represent one of the main, if not the main, channel of communication for responder actors.

Security elements

15. Security elements in a deliberate context derive from the involvement in response operations of the security sector, namely, on the one hand, both: i) the military engaged in military (*i.e.* not humanitarian) operations; ii) law enforcement authorities engaged in domestic criminal investigations aimed at identifying and prosecuting the person(s) responsible for the use of biological agents within the relevant national jurisdictions; and, possibly, iii) international teams engaged in fact-finding, aimed at establishing relevant facts to confirm the use of biological agents.

16. In general terms, the relationship between humanitarian, health and security operators, both at national and international levels, in a politically charged environment might raise specific hurdles due to the need for the former to maintain their neutrality and impartiality, while operating in the field at the same time as, and possibly in cooperation with the latter.[15] This challenge might be of particular relevance in a situation where the militaries might deploy in a confrontational situation between States, possibly within a conflict, with security tasks. The distinction between the involvement of the militaries in humanitarian operations (with logistical, medical or other support) and their security operations might become blurred, particularly if a deliberate use were to be confirmed, and an Article VII request submitted.[16] At the same time, while guidelines have been developed for the use of military assets in humanitarian operations while preserving the impartiality and neutrality of humanitarian operators, it is worth exploring further whether they would be fully suitable for an Article VII situation.

17. Routine activities by the health and humanitarian sector, moreover, would acquire a different value in a situation where either domestic or international investigations were to be carried out. Information, such as medical records, medical or other interviews, biomedical or environmental samples that the responder organizations might collect would

[14] This challenge has been underlined several times by WHO Health Security Interface representatives at the various meetings.

[15] See, e.g. UNOCT interagency interoperability project, fn. 12, supra, Scenario-based Gap Analysis Executive Summary, pp. 13 and 18. On this aspect see also BWC/CONF.VIII/PC/WP.39, particularly pp. 7.

[16] See also Wilton Park, Report, "Responding to deliberate biological release: the requirements for effective, coordinated international action," Wednesday 27 – Friday 29 September 2017 | WP1556, p. 6.

represent "evidence" from the perspective of a national criminal or an international investigation. Routine activities by non-security actors might risk affecting the work of the security sector, while the work of security actors might negatively impact on humanitarian and public health operations, for example reducing access to communities, areas or important response information or resources.[17]

Information exchange

18. Most importantly, a security environment might restrict or compromise the ability to exchange information among responder actors. On the one hand, information relevant for response operations could become restricted or sensitive due to security requirements. On the other hand, the humanitarian and health community might not wish to share information at their disposal, *e.g.* patient or victim data, with the security community.

19. In this connection, it is of key importance to ensure the timely release of restricted information that can be crucial for response operations.

Operational/logistical challenges

20. On the other hand, security aspects could arise with respect to the situation on the ground, with different degrees of permissiveness, due to possible ongoing tensions and hostilities, the risk of additional attacks, and/or the risk of an environment contaminated with biological agents. This poses specific risks for the health and security of personnel operating on the ground.[18]

21. A non-permissive situation in the field would likely also create a series of logistical challenges, from the perspective of the responder's ability to both deploy and retain international teams to the affected areas.

22. Contamination, moreover, would require higher level of personal protection, as well as heightened containment and disinfection measures. Experiences from previous missions in response to natural outbreak scenarios have highlighted potential challenges with respect to the short notice procurement of (enhanced) protective equipment as well as other required gear. Difficulties could also arise with regard to the availability of effective medical countermeasures (such as vaccines) and the ability to dispatch them to the affected areas.[19] Concurrently, fear of exposure and infection would be an important factor adding to the complexity, including for the desire of the local communities to leave affected areas.

23. A transboundary spread of the outbreak would have an important impact on response efforts. Requests for assistance could be raised also by other States Parties, requiring additional resources from the responder actors, which would also need to adapt to different operational contexts. Aspects related to the control of transboundary movement of people, by air, land and sea would acquire critical relevance.

24. Overall, the above-mentioned security, logistical and other challenges might result in a considerable reduction of the operational capabilities of responder actors.

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[17] See, *e.g.*, the Working Paper circulated by the International Committee of the Red Cross, BWC/CONF.VIII/PC/WP.39, dated 16 August 2016, p. 6.

[18] See, *id.*, p. 3.

[19] See also Wilton Park, Report, "Responding to deliberate biological release: the requirements for effective, coordinated international action," Wednesday 27 – Friday 29 September 2017 | WP1556, p. 9.

IV. Conclusions

25. The general challenges described above call for action in a number of important areas. First and foremost, States Parties to the Biological Weapons Convention need to agree on procedures aimed at operationalizing the provisions of Article VII of the Convention. The discussions and deliberations in the context particularly of MX4 and more in general during the inter-sessional process will offer an important opportunity for promoting tangible progress in this important area.

26. Exercising is also essential for ensuring preparedness to respond to deliberate outbreaks of disease. Canada has made contributions in this area as well, by sponsoring various table-top exercises, including among relevant international organizations.

27. Ensuring effective cooperation by States with international organizations and among these institutions is crucial. Various activities supported by Canada involving relevant international organizations, including the above-mentioned UNODA project, represent a contribution in that direction.